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Supreme Court, U. S.
FILED
JUL 1 1972
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IN THE

Supreme Court of the United States

1971 - October Term
No.

ANTONIO SEGURA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 21st day of March, 1972, which affirmed a judgment of conviction upon the verdict of a jury before the Honorable John M. Cannella, in the United States District Court for the Southern District of New York.

Petitioner was convicted of conspiracy to import heroin into the United States, in violation of Title 21, United States Code, Section 173 and 174, and receipt of illegally imported heroin in violation of Title 21, United States Code, Sections 173 and 174.

Petitioner was sentenced to a term of 18 years on each count to run concurrently.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Second Circuit was entered on March 21, 1972, in open Court. No opinion was filed.

A notice of motion dated May 10, 1972 for leave to file a petition for rehearing, with a suggestion for petition for rehearing in banc, was granted on May 12, 1972.

Petition was to be filed by May 26, 1972.

A petition for rehearing was filed and the petition for rehearing with a suggestion for petition for rehearing in banc was denied on June 2, 1972.

Jurisdiction of this Court is invoked under Title 28 Section 1254(1) United States Code.

STATEMENT OF THE CASE

This petition is a continuation of factual circumstances which revolve around the discovery of 93-1/2 kilos of heroin valued at $10,500 per kilo.

The narcotics were stored in the rear recesses of a Citroen automobile and shipped from France to Spain, Puerto Rico, Mexico, Texas and finally to New York City.

The car was accompanied by the two French nationals named defendants in the

indictment.

In addition two other French nationals were in New York City at the time of its arrival.

Another named defendant, Taillet, arrived in New York independently of the other persons and the car.

Taillet's mission, performed in consideration of $5,000, was to meet the seller's representatives and the buyer and arrange a transfer of the drugs and money.

Petitioner was named as the purchaser of the drugs.

The buy and sell operation was in "cloak and dagger" style with identifying key-chains and keys, pre-transfer observations,

and clandestine meetings in hotel lobbies and lounges.

After a transfer of the drugs and some difficulty in the required payments, Taillet was arrested.

The entire plot came to light when Taillet defected and became a Government witness.

As Taillet, the Government's star witness told it, he was a cabaret entertainer who fell in with a bad benefactor.

This benefactor, a named co-conspirator, Loule, who Taillet saw periodically over the years in France, suggested the present mission to Taillet. One reason for this might be that Taillet had successfully performed a

money smuggling mission for Loule several years back involving $100,000 carried from Canada to France, at a fee of $2,000 for Taillet.

Although Taillet knew Loule to have a reputation as a gangster and trafficker in drugs, nevertheless Taillet testified about his heartfelt belief that there could not be any violation of the law by merely exchanging valises with money and whatever else was in them, in New York City.

However, Taillet did admit to believing that drugs were involved.

Taillet said he realized that he was deeply involved in a crime after conversing with a Frenchman while in jail.

Taillet generally portrayed himself as a dupe and as a last-billed minor performer in a giant drug sale.

However, Taillet admitted another previous visit to New York on cross examination during the trial, about which he had not testified on the Government's case in chief.

This particular visit in 1969 involved a deal with a man named Tonio. Certain phone calls were made to Marseilles to and from a person named "Riccard".

The Government, among other things, spoke of Taillet in summation as a person who had no motive to lie, stating that there was no evidence that petitioner had ever seen Taillet before this transaction.

However, the Government stated the opposite at sentencing. It was admitted that Taillet had been in New York in the past on other narcotic transactions involving the petitioner.

Petitioner was arrested a short time after Taillet was apprehended.

MOTION TO SUPPRESS

Certain documents and papers and a gun were seized when a search of the petitioner's apartment took place.

Petitioner was taken to the offices of an Assistant U.S. Attorney, where petitioner claimed he waited 1-3/4 hours, he requested

and was denied a lawyer, and he purportedly consented to a search of his home because there were already agents in his home and he feared for the health of his pregnant wife and the well being of his elderly mother. Furthermore, he was afraid that the officers would injure and destroy his home.

Government witnesses corroborated that there actually were agents in the petitioner's apartment when the petitioner phoned his wife but stated that they had not conducted a search.

They stated they were invited in by the petitioner's wife, after they returned petitioner's dog, and had informed petitioner's wife that her husband had been arrested.

Petitioner disputes the claims of Government witnesses that the Assistant U.S. Attorney stated to him, as Government witnesses testified, that if petitioner did not consent an application would be made for a search warrant, which may or may not be granted.

Petitioner stated that he initially didn't want to phone his home because agents were there and the home probably had been searched already. His suspicions were confirmed when his wife told him over the phone that six to eight people were walking all over the house.

Petitioner stated the Assistant U.S. Attorney expressed a firm hope that the petitioner would not put the Assistant U.S. Attorney through the trouble of getting a search warrant.

Petitioner claimed the Assistant U.S. Attorney threatened to have his wife deported as an alien and arrested if petitioner did not fully cooperate.

The District Court denied the motion to suppress on the ground that petitioner and his wife consented to it.

ESCAPE

Evidence of a later and fairly sophisticated escape by the petitioner was presented in great detail during the trial on the narcotics charges.

Stuffed dummies with paint brush-bristle hair, a hacksaw blade, cut bars and sheet-rope

were introduced as evidence against the petitioner.

The Court charged the standard flight charge.

ALIAS

Petitioner was indicted under an alias, Winfredo Valentin, and referred to by that name throughout the trial.

Petitioner purportedly used this name when he purchased two automobiles some time after the drug transfer in question took place.

QUESTIONS PRESENTED

I. Did the Prosecution deprive the petitioner

of a fair trial and due process of law by permitting its main witness, an accomplice of the petitioner, to testify falsely, by failing to correct his testimony, and by permitting a false portrayal of the witness to be presented to the jury?

II. Did the trial court properly find a consent to search the home of the petitioner to be the unequivocal, free and intelligently given consent uncontaminated by actual or implied duress and coercion, as required by the Fourth Amendment?

III. Did the trial court deprive the petitioner of a fair trial and due process of law by accepting highly prejudicial evidence of an escape and did the Court err in

failing to charge that flight and feelings of remorse do not necessarily reflect actual guilt?

IV. Was the petitioner denied a fair trial and due process of law by the prejudicial comments of the Court upon the heinousness and evils of heroin and drug crimes?

V. Was the petitioner deprived of a fair trial and due process by the prosecutor's act of unfairly bestowing an alias upon the petitioner in the indictment?

REASONS FOR GRANTING THE PETITION

Question one accents another aspect of the duality of the role of the prosecutor.

How circumspect must a prosecutor be in presenting a defecting criminal participant as a witness for the Government, for assessment by a jury?

One fact is certain. More than ever before, law enforcement must rely on the turncoat, the defector, the informer, the in-process-of-reforming-criminal for assistance and testimony in ferreting out and prosecuting crime.

There can be no doubt that narcotics prosecutions rely on and have resorted to the use of accomplices in ever more central roles.

However, as informers, defectors and accomplices become more numerous, there mounts a serious danger of unfair prosecution

and perjury because of the self-seeking interests of co-conspirators.

Thus are the interests of defendants and the needs of the prosecutor now clashing in a struggle without guidelines.

This very battle needs re-examination at this point in time of the development of law enforcement.

This Honorable Court has no choice but to consider the "criminal defector" issue a timely matter upon which the Court should speak.

The defector, Taillet, stated that he never realized the consequences of his acts, that he had never dealt in drugs before, and that after the one international currency

smuggling transaction with Loule, he had only seen Loule infrequently.

Taillet said that Loule told him there would be no risk involved as he was only "transacting".

Taillet was portrayed before the jury as a man who knew nothing about the world of crime.

He knew he was doing something wrong, but no law could prohibit the taking of money in a valise from a car or hotel as far as he could conceive.

However, he knew it was a million dollar transaction and was being paid $5,000 for his involvement.

Only when incarcerated on West Street

did Taillet realize he was possibly facing heavy punishment for a crime.

The prosecution spoke of Taillet in summation, making the following points, in substance:

1. There was no evidence that Segura had seen Taillet before April 1971.
2. There was no evidence that Segura knew Taillet's wife.
3. Taillet didn't know people's real names in the operation - Pierrot was really Mosca, Fernand's last name was unknown, nor was Loule's last name known.
4. Taillet was not told the whole story at once.

5. Taillet had no motive to lie.

6. Taillet told the prosecutor, the prosecutor didn't tell the events to Taillet.

7. An individual does not necessarily become a despicable character simply because he decides to cooperate with the Government.

At his sentencing, the prosecution portrayed Taillet in substance as follows:

1. The evidence shows that Mr. Segura knew of Taillet's previous trips to New York, and of his prior associations with another person named Antonio.

2. Segura knew these things because Taillet had been in New York on other

narcotic transactions which had involved Segura or one of Segura's associates.

The comments by the prosecutor on sentence evidence represent a complete turnabout. Obviously the prosecution believed Taillet, its principal witness, was a regular narcotics trafficker and yet failed to make this clear to the jury.

Furthermore, the prosecution stated that Taillet did not tell the truth at trial about seeing or negotiating with the petitioner on prior narcotic deals.

It has been long settled that the knowing use by the prosecutor of perjured evidence, or the deliberate suppression of evidence,

constitute a denial of due process of law and warrants the granting of a new trial. Mooney v. Holohan, 294 U.S. 103 (1935).

Although most of the reported cases in the field have in fact involved claims of a deliberate suppression of evidence by the prosecutor, this principle of due process is not limited to cases where defense counsel chose to make a direct attack on the integrity of the prosecutor's staff. From the point of view of the defendant, of course, it matters little whether the deprivation of due process is termed willful or negligent.

If defendants are to be protected by due process, it must be equally a violation if the perjury or suppression occurs even without

the actual knowledge of the prosecutor.

In Pyle v. Kansas, 317 U.S. 213 (1942), the second landmark case in the suppression of evidence field, there were unrefuted charges that perjured testimony was offered and that favorable evidence had been suppressed by the authorities. However, as appears from the record in that case, there was no claim that the prosecutor himself had been a party either to the perjury or the suppression. This important aspect of the record in this case was emphasized by the Court of Appeals in Curran v. Delaware, 259 F.2d 707, 713 (3rd Cir. 1958), cert. denied, 358 U.S. 948, which the Court below cited and then ignored on this point. No longer, as Curran teaches, must the defendant

show that the perjury or suppression occurred with the active connivance or cognizance of the prosecutor himself (259 F. 2d at 723). It should be sufficient even if the fact of perjury or suppression does not appear until much later. See Jones v. Commonwealth of Kentucky, 97 F. 2d 335, 338 (6th Cir. 1938).

In Napue v. Illinois, 360 U.S. 264 (1959), the Court made it plain that the initial intent of the prosecutor was not material. There, the principal state witness had testified that he had received no promise of consideration in return for the giving of his testimony. The District Attorney had in fact promised him consideration, but he sat silent in the courtroom and did nothing to correct the false

testimony of the witness. However, he had not initially solicited the perjury. The Supreme Court ordered a new trial even though the false testimony related solely to the credibility of the witness. The Court stated:

> "First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Curran v. Delaware, 259 F.2d 707. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 U.S. 28; United States ex rel. Thompson v. Dye, 221 F.2d 763; United States ex rel. Almeida v. Baldi, 195 F.2d 815; United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382.

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness * * *. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557; 136 N.E.2d 853, 854-855; 154 N.Y.S. 2d 885, 887:

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. ... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that could in any real sense be termed fair.'" (360 U.S. at 269-70).

Savvides, quoted by the Supreme Court in Napue, was also not a case of deliberate suppression in the classic sense, because the suppressed information was a matter of public record concerning which the defense counsel either knew or should have known. Savvides has thus been properly described as an example of a negligent suppression of evidence.

> "[I]t can be argued that a merely negligent suppression of evidence, going only to the credibility of a witness, is not so prejudicial a breach of the prosecutor's duty to insure defendant a fair trial as to require reversal of the conviction. The court takes the opposite tack in the Savvides case. In order to discipline the prosecutor effectively, it presumes prejudice from error." (32 N.Y.U. Law Rev. at p. 612, 1957)

See also U.S. v. Accarino, 408 F.2d

512 (2nd Cir. 1969) and U.S. v. Bonnano, 430 F.2d 1060 (2nd Cir. 1970).

Our law imposes solemn duties and responsibilities upon a public prosecutor in a criminal case.

The reported decisions, and the Canons of Ethics, fully reflect the proper concern of both the judiciary and the bar with any deviation from the strict standards and responsibilities placed by law on the public prosecutor. The Supreme Court of the United States has made it clear that the failure of the prosecutor to comply with the full measure of his duty is, in itself, a violation of due process of law. Mooney v. Holohan, 294 U.S. 103, 112 (1935). None of the reported decisions suggest that the

prosecutor may relieve himself of any of the solemn obligations imposed by law.

Stated plainly, a prosecutor must refrain from using any improper methods in order to obtain (and to sustain) a conviction. The classic statement of this principle is set forth in Berger v. United States, 295 U.S. 78 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed,

> he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Defense counsel are entitled to the knowledge of certain facts and the prosecutor has no right to withhold facts. A prosecutor may not ignore evidence which is in the accuseds' favor. United States ex rel. Montgomery v. Ragen, 86 F. Supp. 382, 387 (N.D. Ill. 1949). A prosecutor may not withhold from the Court any evidence which may be material to the defense. United States v. Schneiderman, 106 F. Supp. 731, 739 (S.D. Cal. 1952). A prosecutor may not withhold evidence by deciding

unilaterally, that such evidence would be inadmissible, or not otherwise useful to the defense.

The duty of the prosecutor to make full and frank disclosure of documentary materials in his files was well stated by the Court in United States v. Zborowski, 271 F.2d 661 (2nd Cir. 1959):

> "The requirement that the government must prove its case beyond a reasonable doubt means, at the very least, that the government itself should not, by any failure to disclose relevant evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it puts on the stand." (271 F.2d at 668).

The prosecutor in a criminal case has, rightly, many advantages. But if he does not comply with the full measure of his responsibility to the public and to the defendants, if he is irresponsible or negligent, our Courts should not relegate defendants as they were relegated here, to the remedy of self-help, and to the necessity of organizing their own private F. B. I., to ferret out the evidence while a cloak of silence is very carefully preserved by the prosecutor.

There can be no problem of whether the verdict might have been affected by the false portrayal of and perjury by Taillet.

That issue was raised and disposed of in Lusterino v. United States, 450 F. 2d 572

(2d. Cir.).

Taillet was basically the only witness against the petitioner.

The indictment alleges Taillet performed all of the overt acts, except one, in furtherance of the conspiracy.

The verdict clearly depended upon whether Taillet was believed or disbelieved.

Taillet well could have been viewed much differently were his prior narcotics dealings in New York with other persons properly revealed to the jury.

Taillet would not have fit the role of a misguided, peripheral participant were it a fact that he had trafficked in drugs previously.

Because Taillet's tendency to minimize

his own role went unexposed, the jury was not able to perceive that he should be skeptically viewed as to whether he maximized the petitioner's role in the plan.

It is certain that he may have maximized the petitioner's participation.

Question two deals with the problem of guidelines for determining the voluntariness of the relinquishment of the Fourth Amendment right and the consent to a search of one's home.

A consideration of the test to be applied in evaluating whether a free consent was given is involved. It is submitted that the Court should review whether the free consent test should be a "subjective" one or an

"objective" one.

"Subjective" herein will refer to the viewpoint of a person with the petitioner's makeup and circumstances, and "objective" is used to refer to the perceptions and reactions of the mythical, legal, reasonable man.

The instant fact pattern involves the not so unique situation of a defendant-petitioner in custody in the office of an Assistant U.S. Attorney. However, we also must consider the uncommon fact that allegedly a "consent" was given by telephone for a search of the petitioner's home miles away.

Furthermore, the customs agents apparently were eavesdropping on the conversation in which the petitioner purportedly

informed his wife that he had given a consent.

The Consent to search under the Fourth Amendment is a relinquishment of a constitutional right that traditionally has been protected by the Courts.

The Courts have increasingly imposed great burdens upon the prosecution to show that a consent was intelligently and freely given.

The novel combination of typical and unusual circumstances involved in the instant consent, suggest that federal law enforcement officials may have stumbled upon or deliberately developed a new procedural technique which demands judicial scrutiny and regulation.

It is the petitioner's position that he

did not unequivocably, freely and intelligently consent to a search of his home.

Clearly certain factors appear:

1. Petitioner was in custody.
2. He had requested counsel.
3. Petitioner had waited 1-3/4 hours to see the Assistant U.S. Attorney.
4. Petitioner at the time of the request for consent was truthfully told that agents were already present in his home.
5. Petitioner had spoken to his wife by phone in both Spanish and English.
6. Petitioner's wife was pregnant and present in the home.
7. Petitioner's elderly mother was also

in the home.

8. Petitioner testified that he feared his wife's health would be injured in some way and that his home might be damaged.

9. The Assistant U.S. Attorney stated that an application for a warrant could be made to the magistrate in the same building which might or might not be granted.

10. The time of the request for counsel was put in issue.

11. The consent of petitioner's wife was put in issue after petitioner testified that his wife told him over the phone that agents were already in the home

and that she believed they might destroy the premises.

12. A phone call was made to the home requesting that the agents call in to the Assistant U.S. Attorney's office.

13. Defendant expressed fear and apprehension for his home and family and only then "consented" to a search.

As a result of the questioned search, documents and a gun were found.

Consent is a waiver of the constitutional protection. Consent, therefore, makes any product of any search, no matter how unreasonable, admissible in evidence.

Because "consent" constitutes a waiver of constitutional protections: "Courts indulge

every reasonable presumption against waiver of fundamental rights." (Johnson v. Zerbst, 304 U.S. 458).

When consent is claimed by the state the burden of proof is upon the Government affirmatively to establish free and voluntary consent (Pekar v. United States, 315 F.2d 319; Hall v. Warden, 315 F.2d 483; United States v. Viale, 312 F.2d 595; Villano v. United States, 310 F.2d 680; United States v. Smith, 308 F.2d 657, 663; United States v. Como, 340 F.2d 891).

The general rule is that consent must be given freely and intelligently. It must be unequivocal. It must be uncontaminated by any form of duress or coercion actual or

implied (Amos v. United States, 255 U.S. 313; Channel v. United States, 285 F.2d 717; Judd v. United States, 190 F.2d 649; Higgins v. United States, 209 F.2d 819).

The prosecution must show that the strict requirements of a waiver, i.e., the voluntary relinquishment of a known right, have been met, before consent to waive the protection of the Fourth Amendment will be found. In Channel v. United States, 285 F.2d 217, 219, the Court said:

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied."

In U.S. v. Gross, 137 F. Supp. 244,

District Judge Weinfeld stated:

> "In passing upon the issue of consent certain general principles should be noted. A waiver of a constitutional right is not be be lightly implied. Indeed, the courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the least for fundamental rights. Consent to search and seizure in deregation of one's constitutional right of privacy under the Fourth Amendment must be proved by clear and unequivocal evidence and it must appear that the consent was not the result of duress or coercion, actual or implied."

Where the person consenting is under arrest at the time of search, the voluntary nature of the consent is particularly suspect. (Judd v. U.S., 190 F.2d 649; Watson v. U.S., 249 F.2d 106.)

Where other coercive factors appear,

the unlikelihood of a free consent is strong.

In Villano v. U.S. (1962) 310 F.2d 680, there were threats to break into the store where defendant worked.

In Greenwell v. U.S. (1964) 336 F.2d, there was a delay in taking the defendant before the magistrate.

Clearly coercive factors affect the voluntariness of the consent.

The problem presented herein is the extent of the effect of these factors upon the petitioner.

There was delay in bringing the appellant before a U.S. magistrate.

Petitioner claimed he was made to wait approximately two hours to see the Assistant

U.S. Attorney.

His wife had informed him of presence of agents in the apartment.

His wife feared they would "wreck" the apartment.

The appellant's wife was pregnant.

The appellant's elderly mother was in the apartment.

Appellant claimed that he requested counsel.

Consent under all the circumstances must be inherently probable upon all the facts of the case, probable in common sense and in human experience.

From the petitioner's viewpoint it is clear that subjectively the consent was not

freely given.

Even assuming the facts are as stated by the agents, there is no contradiction of the petitioner's assertion that his wife told him that the agents were all over the apartment and they were going to tear it apart.

It is inherently difficult to speculate about what the reasonable man would have done when the circumstances suggest the presence of abnormal, unusual pressures.

Perhaps in recognition of this, the District Court apparently applied a modified objective test in ascertaining what the Court believed petitioner's state of mind reasonably was expected to be. This Honorable Court should specify the proper test to be applied in these unusual circumstances.

Question three deals with problem of

whether evidence of an aggravated escape, which is of minimal probative value as to the earlier substantive crime, was used in such a way to prejudice the accused at trial, in violation of due process. Question three also involves the failure of the Court to clarify in its jury charge that flight does not always reflect a consciousness of guilt and that a consciousness of guilt, or feelings of guilt, are not always evidence of actual guilt.

Whenever there is an escape, there is always an element of so-called derring-do.

Every escape has a certain quantity of risk.

Evidence of an escape to show the consciousness of guilt normally must have

some nexus of highly prejudicial conduct by the accused.

Always, caution must be the byword in presenting to the jury the evidence of an escape occurring subsequent to the criminal occurrences on trial.

Escape inherently creates rancor. The legal fictions which permit the introduction of later-escape evidence, are worthy of the Court's re-examination and re-definition.

Clearly where both Taillet's credibility is in issue, and where the jury may entertain some doubt of the petitioner's silence, an improper consideration of the law flight may have been the deciding factor.

The prosecution introduced evidence

of the escape of the appellant from the Federal Detention Headquarters in New York City.

Dummies were found in two beds according to the testimony and appellant was found in an elevator shaft.

A hacksaw blade was found and photos of the sawed bars of the cell were introduced.

The Court instructed the jury as follows:

> "In reference to the so-called escape or the flight or the concealment, whatever you want to call it, because in the beginning there was sort of concealment, and then he was hiding or was found in an elevator -- I don't know if he was hiding in it but in any event he was found in an elevator shaft -- this kind of conduct after the crime has been committed does not create a presumption of guilt. It is, however, a circumstance which may tend to prove consciousness of

guilt and should be considered and weighed by you in connection with all the other evidence in the case.

"The weight to be given to the evidence we are talking about -- namely, being found, and the dummy being put in the bunks, and so forth -- depends upon the motives which prompted it, and all of the surrounding facts and circumstances, and so you will have to make a judgment on that. Consider all the facts and circumstances and then come up with your own decision on that particular aspect!"

In the first place, the Court should not have permitted the highly prejudicial evidence of an apparently sophisticated jail escape to be admitted.

The escape involved sawed bars, a hacksaw blade, paper mache type dummies, with paint brush-bristle hair, and elevator

shaft concealment.

The Court failed to properly limit the nature of the evidence by any statement that escape is only slight evidence of guilt, as was suggested in U.S. v. Crisp, 435 F.2d 354 (1970) (P. 359).

In addition the Court failed to charge.

> "There are so many reasons for conduct consistent with innocence that it scarcely comes up to the standard of evidence tending to establish guilt * * *." As set forth in Ryan v. People, 79 N.Y. 593, 601 (1880).

In Alberty v. U.S., 162 U.S. 499 (511), 16 S. Ct. 864, 868, the Court stated:

> "It is not universally true that a man, who is conscious that he has done wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent,

right and proper; since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury - not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

In Wong Sun v. U.S., 371 U.S. 471, 483-484, 83 S. Ct. 407, 415-416, the Supreme Court stated:

"[W]e have consistently doubted the probative value in criminal trials

of evidence that the accused fled the scene of an actual or supposed crime."

It is perhaps of even more importance that the District Court failed to instruct the jury that one who feels some guilt concerning an act has not always consciously committed that act.

As is stated in Miller v. U.S., 320 F.2d 767 (1963), at page 772-773:

"The observation that feelings of guilt may be present without actual guilt in so-called normal as well as neurotic people has been made by many recognized scholars and is a significant factor in the contemporary view of the dynamics of human behavior.

"It is not suggested that guilt feelings may not reflect actual guilt, but only that they do not always reflect it, and that Wigmore's commonly accepted opinion that 'guilty

consciousness' is 'the strongest evidence * * * that the person is indeed the guilty doer,' should not be elevated to an immutable principle either of law or human behavior.

"When evidence of flight has been introduced into a case, in my opinion the trial court should, if requested, explain to the jury, in appropriate language, that flight does not necessarily reflect feelings of guilt, and that feelings of guilt which are present in many innocent people, do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given, that they are not to presume guilt from flight; that they may, but need not, consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt." (emphasis added)

In light of the highly prejudicial evidence of the escape presented, the Court should have so charged the jury even without a request

by counsel.

In brief the charge was incomplete because the Court failed to inform the jury that "consciousness of guilt does not always reflect actual guilt" and that feelings of guilt are present in many innocent people.

Question Four involves the problem of inflammatory judicial comments on the subject matter of the offense and their effect upon the right to a fair and impartial jury.

The Court described heroin as a "horrible drug", which caused "leprosy of the will" and "created a monster".

The Court stated "all civilized communities have laws against this kind of drug."

"Our fight against narcotics . . ." was

the phrase used by the Court to introduce remarks which traced the history of Federal anti-drug legislation.

Characterizations of and reminiscences about the drug problem in our country have no proper place in instructions to a criminal jury.

Certainly the Court itself should avoid all avenues which interject emotionalism into the hopefully cool and dispassionate process by which the jury theoretically decides guilt.

The Court further drew the jury into the thrust of his remarks by alluding to a community of interest in "our fight" against drugs.

Having heard the Court's express denounciation of drugs and understanding its

normal and necessarily following implicit castigation of drug defendants, the jury may well have felt inclined to use the petitioner's case as a vehicle to strike back in "our fight", instead of giving the petitioner the objective evaluation to which he was entitled.

The trial judge is more than a mere moderator or umpire. He is charged with the duty of seeing that the trial is conducted properly from beginning to end. (Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 383, 75 L. Ed. 857).

The requirement of strict impartiality of the trial judge is basic to our system of justice. The reason was aptly set forth in United States v. Ah-Kee Eng, 241 F.2d 157,

161, as follows:

> ". . . the jury hangs on his every word and is most attentive to any indication of his view of the proceedings."

In Wilson v. United States, 250 F.2d 312, the Court elucidated the doctrine set down by the Supreme Court of the United States in Bollenbach v. United States, 326 U.S. 607:

> "It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way . . ."

Question Five presents the issue of the subtle but pervading prejudice which arises from the apparently innocent reference to an accused,

by an unwarranted "alias".

Several documents seized from the petitioner's home bore the name Winfredo Valentin.

The documents dealt with the purchase and operation of two new automobiles.

The evidence of the purchase of the two automobiles was at best peripheral and only in a tangential fashion could it be said to have affected the substantive issues of the trial.

The prosecution, however, seized upon the name Winfredo Valentin used in these papers, and presented it at trial as an alias that petitioner always used, after having first bestowed this name as an alias upon the

petitioner in the indictment.

Clearly the potential for prejudice is high and the probative value of such a name is nil, where unrelated to the trial issues.

The jury well may have considered the petitioner evil simply because he had an alias and thus possibly a criminal fingerprint record.

At the trial there was no evidence of continual or regular use by the defendant of this or any other alias, yet he was subjected to all of the commonly held prejudices against people who use fictitious names in the eyes and minds of the jury.

CONCLUSION

The petition for certiorari should be granted because:

1. The petitioner was deprived of a fair trial and due process of law when the prosecution permitted its main witness, an accomplice of the petitioner, to testify falsely without correction and thus creating a false portrayal of the witness' character, involvement and reliability to be presented to the jury.
2. The trial Court erred in improperly finding that the consent to a search of the home of the petitioner was unequivocal, free, and intelligently

given without duress and coercion contrary to the Fourth Amendment requirements.

3. The trial Court deprived the petitioner of a fair trial and due process of law by admitting highly prejudicial evidence of an escape, and failed to instruct the jury completely, and accurately that flight does not necessarily reflect guilt, and that consciousness or feelings of guilt are not evidence of actual guilt.

4. The petitioner was denied a fair trial and due process of law by jury involving and prejudicial comments from the Court upon the heinousness and evils

of heroin and drug crimes.

5. The petitioner was deprived of a fair trial and due process by the prosecutor unfairly and inappropriately bestowing an alias upon the petitioner in the indictment and at trial.

Respectfully submitted,

HENRY B. ROTHBLATT
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of March one thousand nine hundred and seventy-two.

Present:

HON. PAUL R. HAYS,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Antonio Segura a/k/a Winfredo Valentin,
Edmond Taillet, John Doe, a/k/a Loule,
Marcelle Asfez, Fernand Chaffard,
Francoise Bizard, Etienne Mosca,
Defendants,

Antonio Segura, a/k/a Winfredo Valentin,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is

now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. Daniel Fusaro

Clerk

71-2189

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

United States of America,
Plaintiff-Appellee,

v.

Antonio Segura a/k/a Winfredo Valentin, Edmont Taillet, John Doe, a/k/a Loule, Marcelle Asfez, Fernand Chaffard, Francoise Bizard, Etienne Mosca,
Defendants,

Antonio Segura, a/k/a Winfredo Valentin,
Defendant-Appellant.

- x

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it

hereby is denied.

June 2, 1972

/s/ William H. Mulligan

/s/ Walter R. Mansfield

/s/ Paul R. Hays
U.S.C.J.J.

71-2189

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

United States of America,
Plaintiff-Appellee,

v.

Antonio Segura a/k/a Winfredo Valentin, Edmont Taillet, John Doe, a/k/a Loule, Marcelle Asfez, Fernand Chaffard, Francoise Bizard, Etienne Mosca,
Defendants,

Antonio Segura, a/k/a Winfredo Valentin,
Defendant-Appellant.

- x

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having

requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Henry J. Friendly
HENRY J. FRIENDLY
Chief Judge

June 2, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-13

ANTONIO SEGURA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion. The opinion of the district court denying petitioner's motion to suppress (R. 5) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1972 (Pet. App. A-1-A-3). A petition for rehearing was denied on June 2, 1972 (Pet. App. A-4-A-7). The petition for a writ of certiorari was filed on July 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, at the time of trial, the government possessed undisclosed information that a government witness testified falsely.

2. Whether petitioner voluntarily consented to the search of his apartment.

3. Whether the trial court erred in admitting evidence of petitioner's attempted escape from jail, and in failing, *sua sponte*, to instruct the jury that consciousness of guilt does not always reflect actual guilt.

4. Whether the trial court's comments about heroin deprived petitioner of a fair trial.

5. Whether the use of petitioner's alias in the indictment and the government's evidence at trial was improper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner[1] was convicted of having received, concealed and facilitated the transportation of a quantity of heroin knowing that the heroin had been illegally imported, in violation of 21 U.S.C. (1964 ed.) 174, and of having conspired to violate 21 U.S.C. (1964 ed.) 174. Petitioner was sentenced to imprisonment for concurrent terms of eighteen years and fined $40,000. The court of appeals affirmed without opinion (Pet. App. A-1-A-3).

[1] Indicted with petitioner in count one were six French nationals, including one Edmond Taillet, the chief prosecution witness. The cases against all the French nationals except Taillet were severed.

The evidence at trial, which is not in issue, showed a large scale, complex conspiracy, involving bringing a car from Spain to Mexico and thence to New York where it arrived in April 1971 with 93.5 kilograms of pure heroin concealed in it. Petitioner met in New York with co-conspirator Taillet, received the heroin, paid $377,550 for it, and agreed to pay more later. Taillet was arrested before he received the rest of the money. Petitioner was arrested about two weeks later.

ARGUMENT

1. Petitioner asserts that the government at trial concealed evidence that a government witness testified falsely. On cross-examination Taillet, who had admitted several trips to the United States prior to April 1971, stated that his only dealing in drugs was the April 1971 transaction on trial (Tr. 247).[2] When recalled by petitioner for further examination, Taillet was asked about prior trips to New York and dealings he had on behalf of a certain Frenchman (Riccard), with a man named Tonio in New York (Tr. 716–728). He said that Riccard paid his expenses (Tr. 728) and that Tonio wanted to entrust him with money to bring back to France (Tr. 726). In closing argument, petitioner's counsel challenged Taillet's credibility, saying that Taillet had been coming to New York and dealing in drugs with Tonio (Tr. 765, 780).

[2] "Tr.", "S. Tr." and "II Tr." refer, respectively, to the transcript of the trial, pretrial suppression hearing and sentencing hearing, copies of which have been lodged with the Clerk of this Court. "R." refers to the record on appeal, which is also on file with the Clerk of this Court.

At the sentencing hearing several weeks after trial the prosecutor stated: "[t]he evidence in this case shows that Mr. Goldberger [petitioner's counsel] and Mr. Segura knew very well about Mr. Taillet's prior trips to New York and prior associations with another person by the name of Antonio [sic], and I submit that this is because Mr. Taillet was in New York on other narcotics transactions and they involved either Mr. Segura or one of his associates" (II Tr. 14). Relying on this statement at sentencing, petitioner claims that the government improperly failed to make clear at trial that Taillet's denial of prior narcotics transactions was false. As the United States Attorney represented below, the government was ignorant of Tonio's identity at the time of trial. It learned for the first time after the trial in this case that he was one Antonio Flores, a close associate of petitioner's and a fugitive on another narcotics charge. Thus, the government did not possess any undisclosed information at the time of trial indicating that Taillet had lied. In any event, evidence concerning Taillet's prior dealings in narcotics would have been collateral at best. Defense counsel argued such dealings to the jury, and the government's summation did not contest this argument. The prosecutor's remarks at sentence were supported by the trial record, and not inconsistent with his position and knowledge during the trial.

2. Petitioner challenges (Pet. 37–38) the trial court's ruling, after an evidentiary hearing on petitioner's motion to suppress, that both petitioner and his wife had freely and unequivocally consented to the

search of their apartment (R. 5). The evidence showed that following his arrest on June 14, 1971, petitioner was searched, advised of his rights, and taken to the office of the United States Attorney where he was again advised of his rights (S. Tr. 53–54, 56–58, 109–110, 116–117, 120). The Assistant United States Attorney (Maloney) asked petitioner for permission to search his apartment and explained to petitioner his Fourth Amendment right to refuse permission to search; petitioner was further told that if he withheld permission an application for a search warrant would be made to a U.S. Magistrate, who could either grant or deny the application (S. Tr. 63, 84–85, 112). Petitioner, who appeared to be calm, agreed to the search of the apartment (S. Tr. 63, 112–113, 122, 125). Maloney then telephoned petitioner's wife at the apartment, and informed her of petitioner's arrest and his consent to the search of the apartment;[3] petitioner's wife indicated that she understood and said she had no objection (S. Tr. 128–130). Petitioner then conversed with his wife in Spanish for several minutes after which his wife told Maloney that it was all right to conduct the search (S. Tr. 64–65, 88–89, 128–130). Thereafter the agents searched the apartment and seized certain evidence (S. Tr. 60, 65–66, 71, 78, 113, 120).

[3] Present at the apartment at this time were petitioner's wife, his mother and four or five customs agents who had not yet commenced any search of the apartment (S. Tr. 22, 128, 131, 134, 135).

Although petitioner contends that his consent was given because he feared for the health of his pregnant wife who had told him she thought the agents were going to "tear" the apartment apart,[4] this contention was considered and rejected by the trial judge who heard testimony from petitioner and three of the customs agents. For reasons not set forth in the record, petitioner did not call his wife as a witness to substantiate his claims. In these circumstances the trial court did not err in finding that consent was freely and voluntarily given by petitioner and his wife. See *Bumper* v. *North Carolina,* 391 U.S. 543, 548–549; *United States* v. *Callahan,* 439 F. 2d 852, 861 (C.A. 2), certiorari denied, 404 U.S. 826.

3. Petitioner urges error in the admission of evidence of an unsuccessful escape attempt. Testimony was introduced at the trial that six days prior to the commencement of his trial, petitioner tried to escape from jail by cutting through some bars with a hacksaw and climbing into a nearby elevator shaft, leaving a dummy in his bed (Tr. 651–659). This evidence of the attempted escape was properly admitted to show a consciousness of guilt. See *United States* v. *Crisp,* 435 F. 2d 354, 359 (C.A. 7) (and cases cited therein), certiorari denied, 402 U.S. 947.

Petitioner now claims that the court erred in not *sua sponte* instructing the jury that "flight and feelings of remorse do not necessarily reflect actual guilt"

[4] One of the agents at petitioner's apartment testified that petitioner's wife was "composed" in the presence of the agents and appeared "relatively at ease other than the natural concern to the fact that her husband was arrested" (S. Tr. 133).

(Pet. 15). In closing argument petitioner's counsel, noting that petitioner had been in jail for five months, had argued that a man who had done nothing wrong would do anything to escape from jail (Tr. 761). The trial court's charge,[5] given without objection and not challenged in the court below, was a correct statement of the legal principle involved and was sufficiently protective of petitioner's rights. See *Bailey* v. *United States*, 410 F. 2d 1209, 1217 (C.A. 10), certiorari denied *sub nom. Freeman* v. *United States*, 396 U.S. 933. Since no specific instruction was requested by petitioner, the failure of the trial court *sua sponte* to give the form of instruction now sought by petitioner was not plain error.[6] *United States* v. *Solomon*, 422 F. 2d 1110, 1114 (C.A. 7), certiorari denied *sub nom. Sommar* v. *United States*, 399 U.S. 911; see also *United States* v. *Stevenson*, 424 F. 2d 923, 927 (C.A. D.C.).

[5] "* * * [T]his kind of conduct after the crime has been committed does not create a presumption of guilt. It is, however, a circumstance which may tend to prove consciousness of guilt and should be considered and weighed by you in connection with all the other evidence in the case.

"The weight to be given to the evidence we are talking about—namely, being found, and the dummy being put in the bunks, and so forth—depends upon the motives which prompted it, and all of the surrounding facts and circumstances, and so you will have to make a judgment on that. Consider all the facts and circumstances and then come up with your own decision on that particular aspect" (Tr. 824–825).

[6] *Miller* v. *United States*, 320 F. 2d 767 (C.A. D.C.), relied upon by petitioner, is not to the contrary since Judge Bazelon there stated that, if requested, the court should give an instruction to the effect that consciousness of guilt does not "necessarily reflect actual guilt." 320 F. 2d at 773 (opinion of Chief Judge Bazelon). Here, no such instruction was requested.

4. Petitioner protests certain remarks of the trial judge, who stated, without objection, during his instructions to the jury: "We know that in this case, which concerns a horrible drug which I have described many times as a leprosy of the will power * * *." (Tr. 804–805). Later in the charge the trial court briefly reviewed the history of heroin use and the enactment of the laws "against" heroin (Tr. 806–807). Such remarks did not deprive petitioner of a fair trial. Petitioner did not deny that this case involved a "major conspiracy to import drugs" into the country, but rather contended that he was not involved (Tr. 748). The trial court carefully instructed the jury as to the presumption of innocence, burden of proof and standard of reasonable doubt (Tr. 807–808, 843–845). Prior to the closing arguments, the judge told the jury that he had "no opinion" in the case (Tr. 745). During the charge he instructed the jury that they were the sole judges of the facts, that the court's comments on the facts were not binding on the jury, and that nothing said by the court was to be considered as evidence (Tr. 805–806, 814). The judge's remarks were not prejudicial to the petitioner.

5. Finally, petitioner claims that use of his alias in the indictment and at trial was prejudicial error. At trial, two automobile salemen identified petitioner and testified that using the name "Wilfredo Valentin," he had purchased two new cars for approximately $7,000 in cash during April and May, 1971 (Tr. 424–438). Documents relating to the sale of the automobiles and

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naming the purchaser as "Wilfredo Valentin" were also introduced into evidence (Tr. 425–428, 434–435). The evidence concerning use of the alias was proper here to show consciousness of guilt and participation in a transaction where it was desirable to conceal one's identity. See *United States* v. *Sutton*, 446 F. 2d 916, 922 (C.A. 9), certiorari denied, 404 U.S. 1025; *United States* v. *Wilkerson*, 456 F. 2d 57, 59 (C.A. 6), certiorari denied, June 26, 1972 (No. 71–6505 October Term, 1971). Since the evidence showed petitioner did in fact use the alias, inclusion of it in the indictment was not prejudicial. *United States* v. *Miller*, 381 F. 2d 529, 536 (C.A. 2), certiorari denied, 392 U.S. 929.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD A. LEVIE,
Attorneys.

AUGUST 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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FILED
SEP 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971
No. 72-13

ANTONIO SEGURA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

HENRY ROTHBLATT
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POINT I

The government argues that any evidence that Edward Taillet was lying about his past drug dealings would have been collateral. The government also argues that the defense alluded to such prior dealings on summation and that the government did not contest this argument in its summation.

Taillet's past dealings in narcotics, and the fact that he concealed them at trial bear directly on his credibility as a witness. The government itself, in summation, played up Taillet's supposed naivete as the basis for his credibility. His background of narcotics dealings provide the motive to lie which the prosecution assured the jury did not exist.

Napue v. Illinois 360 U.S. 264 is

expressly contrary to the government's position. As quoted in petitioner's original papers, the court in Napue stated:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."
>
> 360 U.S. at 269

That the concealed evidence went to Taillet's credibility does not lessen the necessity to disclose it. Credibility is the primary concern of the jury. It must determine who is to be believed. The withholding of evidence which is necessary for such

determination has been condemned by this and other courts and should not be countenanced in this case.

The government contends that the prosecutor's remarks at sentence were supported by the trial record, not inconsistent with his position at trial, and did not reflect any knowledge undisclosed at trial. The petitioner has searched the record thoroughly and has failed to uncover a single instance, outside of the argument by defense counsel, in which Taillet was correctly portrayed as having a history of narcotics transactions. On the contrary, the prosecutor went to great lengths in his summation to demonstrate Edward Taillet's naivete. The prosecutor explained to the jury that Taillet was not told the entire

plot, nor even the last names of his co-conspirators. This is hardly consistent with a representation of an experienced narcotics trafficker.

Finally the government asserts that even if it failed to present evidence of Taillet's background, the petitioner was not prejudiced since defense counsel argued such dealing to the jury. Argument is not evidence. Although the defense could well argue that Taillet was no lightweight, it was denied the evidence needed to demonstrate its claim. Certainly the opportunity to argue one's beliefs in summation is not to be equated to the possession of real evidence to be presented for the jury's consideration.

POINT II

The government insists that the petitioner and his wife freely waived their Fourth Amendment protections and consented to a search of their apartment. It claims that the petitioner was arrested, taken to the Assistant United States Attorney, advised of his rights, and asked for permission to search his apartment. The government contends that the petitioner consented to the search and then telephoned his wife who also consented.

This trite sequence of events ignores the circumstances attendant on these events which exerted considerable coercion upon the petitioner's supposed "voluntary waiver".

Importantly, the petitioner was in

the custody of federal law enforcement officials [and was not represented by counsel although he had requested an attorney]. He was held nearly two hours waiting for the Assistant United States Attorney.

Present during his interview with the AUSA were several other government officials. The petitioner was informed that federal agents were already in his apartment with his pregnant wife and elderly grandmother.

These facts indicate that the petitioner was under the complete domination of the federal officials and he knew his wife to be in essentially the same position. He was in a room with several law enforcement officers and in his apartment were at least five more officers awaiting their

orders. Such a situation can in no way be considered free of coercion.

The court must surely recognize that government officials are not universally viewed as benign figures, anxious to aid and eschewing violence. All too often in the past few years the public has had reason to doubt the self-control of some law enforcement officials. The overwhelming presence of so many officers both with the petitioner and with his pregnant wife and grandmother could easily lead even a more sophisticated person to decide that surrender was the best and safest path to follow. And so, under these coercive circumstances, the petitioner "consented" to the search of his apartment.

POINT III

The government has misconstrued the petitioner's argument concerning the introduction of evidence of his attempted escape. The petitioner contends that it was improper to admit this inflammatory and highly prejudicial evidence because it had little or no probative value on the question of guilt. Years ago this Court recognized that an innocent man may well pursue a course of conduct which a guilty man might also pursue - specifically a flight from a crime scene. Alberty v. United States 162 U.S. 499, 511. This thought has been reiterated in Wong Sun v. U.S. 371 U.S. 471.

Under the circumstances of this case there is no basis whatsoever for the

conclusion that the petitioner's attempted escape evidenced a consciousness of guilt. The petitioner was unable to satisfy the very high bail set for him. He had a family whose welfare concerned him and he faced the prospect of a long, expensive criminal trial. The petitioner had been in federal custody more than six months when he attempted to escape.

The effective denial of bail in this case negates any possible inference of guilt which might be drawn from the flight of the defendant. His continued incarceration created innumerable reasons other than guilt which might easily motivate an escape. Therefore to avoid the inherent prejudice created by the introduction of evidence with no true probative value on the issue of guilt,

the court should have excluded the evidence.

POINT IV

The government contends that the effect of the judge's inflammatory rhetoric on the subject of drugs was cured by later statements made by the court. Specifically, the government contends that any effect was neutralized by the judge's later statement that nothing he said was evidence and that he had "no opinion" concerning the case.

The proper course for the court would have been to avoid such rhetoric in the first instance. It was highly improper for the court to raise images of the horrible effects of narcotics and the communal fight against them and then, somewhat later, to tell the jury to disregard the court's

the court should have excluded the evidence.

POINT IV

The government contends that the effect of the judge's inflammatory rhetoric on the subject of drugs was cured by later statements made by the court. Specifically, the government contends that any effect was neutralized by the judge's later statement that nothing he said was evidence and that he had "no opinion" concerning the case.

The proper course for the court would have been to avoid such rhetoric in the first instance. It was highly improper for the court to raise images of the horrible effects of narcotics and the consequent fight against them and then narrowly caution to tell the jury to disregard the courts

statements in coming to a decision. The jury can well believe that the judge would do nothing improper and, therefore, if the judge said something, he meant to say it and they were meant to hear it.

The prejudice of inflammatory judicial remarks was not cured by a simple, general disclaimer uttered hours later.

POINT V

The government never connected the use of the name Wilfredo Valentin to the commission of the offense charged. The government claims the petitioner's use of an alias is evidence of consciousness of guilt. Even were that so, there was no evidence presented which connected this consciousness of guilt to the crime charged.

The use of the alias in the trial was a blatant attack on the character of the defendant and as such was improperly made an element of the case. It was obviously the intention of the government to portray the petitioner as an evil man merely because he allegedly used an alias. There being no nexus between the use of the alias and the crime charged, the evidence should have been excluded because of its highly prejudicial nature.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

HENRY ROTHBLATT
Attorney for Petitioner

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Supreme Court, U. S.
FILED
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IN THE

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ANTONIO SEGURA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF AND APPENDIX FOR THE PETITIONER

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SUPREME COURT OF THE UNITED STATES

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ANTONIO SEGURA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

----------x

SUPPLEMENTAL BRIEF AND APPENDIX FOR THE PETITIONER

SUPPLEMENT TO POINT I

The petitioner, Antonio Segura, contends that he was denied due process of law because the government failed in its obligation to reveal evi-

dence that it possessed which proved that its chief witness, Edmond Taillet, was lying.

There have been several shifts in the government's position regarding Edmond Taillet. As detailed in the Petition for Certiorari, (p.8, 9, 17-21) during the trial the government intentionally portrayed Edmond Taillet as a naive first-timer. At the time of the petitioner's sentencing the Assistant United States Attorney told the sentencing judge that Edmond Taillet had a history of narcotics trafficking involving "either Mr. Segura or one of his associates." The government failed to reveal this history to the jury.

On September 13, 1972 Edmond Taillet appeared before Hon. John M. Cannella, D.J. to be sentenced for his role in the alleged conspiracy.

The transcript of the sentencing is fully set forth in the appendix attached hereto. For the third time the government has redrawn the characterization of Mr. Taillet. This portrayal is completely at odds with the previous characterizations and demonstrates the government's reprehensible and constitutionally unfair behavior with regard to Mr. Taillet's history.

Respectfully submitted,
HENRY ROTHBLATT
Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

v

EDMOND TAILLET,

Defendant.

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72 Cr. 308

New York, New York
September 13, 1972

SUPPLEMENTAL APPENDIX

Before

HON. JOHN M. CANNELLA, D.J.

Appearances

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney for
the Southern District of
New York

WALTER J. HIGGINS, JR., Assistant United States Attorney

PAUL K. ROONEY, ESQ.
Attorney for the Defendant.

Also Present:

MARGARIDA MENSA, Official Court Interpretor

THE CLERK: U.S. v Edmond Taillet, for sentencing.

MR. HIGGINS: Goverment is ready, your Honor.

MR. ROONEY: Defendant is ready, your Honor.

THE COURT: Are you Edmond Taillet?

THE DEFENDANT (Through the Interpretor): Yes, sir.

THE COURT: Are you ready for

sentence?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know any legal reason why sentence should not be pronounced at this time?

THE DEFENDANT: No, sir.

THE COURT: Is there anything you want to say in mitigation of sentence or any evidence you desire to produce in that regard?

THE DEFENDANT: I am very sorry for what I did. I did not know exactly the danger that this kind of traffic meant. It has been necessary forme to be in prison for some time to find out what a terrible problem the drugs are causing here in America,

and I am asking for foregiveness to the American Government.

I would like to have a chance to become once again the man that I was before that thing happened, mainly because of my wife, my child and also for myself.

That's all.

THE COURT: The defendant pleaded guilty to an information containing one count which charges a violation of what is referred to in enforcement areas and in the court here as a tax count.

I have the Probation Report, and I hand it over to the Clerk of the Court so that he may deliver it to the

defendant's lawyer and to the United States Attorney so that they may see the contents of the report.

(Pause)

THE COURT: In addition to the Probation Report which the parties have now, I am also submitting another communication from the Probation Department which is dated August 8, 1972, for their perusal.

(Pause)

THE COURT: I incorporate by reference as part of this record the Probation Report as well as the additional communications indicated in my remarks earlier.

I will hear you, counsel.

MR. ROONEY: Thank you, your Honor.

I know your Honor has some familiarity with this defendant and presided over a case where he testified before the Court against another defendant in a rather substantial narcotic case.

THE COURT: I think he testified more than once, didn't he? Didn't he testify in more than one case?

MR. HIGGINS: It is my recollection, your Honor, there was another case, Anthony Sigora.

THE COURT: Maybe he also testified -- was there a motion to suppress? Well, in any event, I know he

did testify in one case in which I was involved.

MR. ROONEY: I only point out, your Honor, that he is 40 years of age, and up until a couple of years ago was managing to lead a fairly law-abiding life. His parents died when he was 14 and as a teenager really began to live by his wits, and up until a couple of years ago he did fairly well.

He has been in custody for a year and a half. I think his recognition of the crime, he has already stated, and his attitude toward the crime is best expressed, I believe, by his cooperation.

I would point out, your Ho-

nor, he has been in custody a year and a half, during which time he has furnished, I believe, substantial co-operation to the Bureau of Narcotics, and I will admit that some of it came in bits and pieces, and the reason for that I think was the information that he had, which I think is substantial, of some harm coming to his common-law wife and step-son.

In view of all this, your Honor, we ask for leniency.

MR. HIGGINS: Your Honor, I must inform the Court that in connection with the documents your Honor has made available to us for review, that Mr. Taillet, as of approximately three

weeks ago, supplied additional information to the government.

Mr. Taillet has admitted his participation in the transshipment of six separate vehicles containing large quantities of heroin into the United States since 1969. Up until three weeks ago, it is the government's position that Mr. Taillet's involvement in narcotics traffic was limited to the Sigora case. Upon the extradition of an individual by the name of Mastrantonio from Canada during the early part of August of this year, new information was obtained concerning Mr. Taillet. When he was confronted with it in August of this year, Mr. Taillet

has admitted candidly to representatives of the government that he was involved in six separate shipments in excess of 200 pounds of heroin since 1969.

We must inform the Court that as indicated in the report, Mr. Taillet has cooperated since the time of his arrest. As Mr. Rooney points out, that cooperation was in bits and pieces.

The government is satisfied that at the present time we have no reason to believe that Mr. Taillet has been other than fully cooperative.

I have nothing further to say in the absence of specific inquiry.

THE COURT: This is a serious case, and in the absence of his cooperation, I am sure I would have sentenced him not under this information, because his counsel who had been assigned under the Justice Act, and who was a former assistant here, in my opinion properly advised the defendant to the point where he was able to pursuade the United States Attorney's office. This is a very serious charge under another section which I believe has palpable punishment much greater than under this section. I don't remember whether it was 173 and 174.

MR. HIGGINS: Yes, your Honor. Total exposure would have been 40

years, I believe.

THE COURT: So the total exposure would have been 40 years. And I have not been loathe in cases involving the transportation of narcotics, the smuggling of narcotics into this country, to impose sentences of 18 years and 25 years and 15 years, and those almost amounted to life sentences in the cases in which I did impose those sentences because the individuals were advanced in years, and there is no time off given for narcotic offenders to any extent, and therefore they have to serve the full time.

So that accomplished by his counsel has done a great deal to li-

mit the punishment in this case from 20 to 10, as I recall the scope of punishment in this case. It was quite an accomplishment.

Under the circumstances it is adjudged that the defendant be turned over to the custody of the Attorney General or his duly authorized representative for a term of imprisonment of three years. However, he, of course will get credit for the time served so that if he has in fact served a year and a half, this will mean a further incarceration of a year and a half, which I think is a very modest sentence considering the quantities involved here and the prospects of

what would have happened to him had he litigated this case, because I am sure his guilt could have been proven very simply from my knowledge of the facts in the case.

He is remanded for that purpose.

MR. ROONEY: May I have just one minute, your Honor.

MR. HIGGINS: Your Honor, the government would request from the Bureau of Prisons that this individual be housed in such institution that would be safe for his person, and the government would write a letter for that purpose.

THE COURT: I tell you I want

to go further than that because I had the unfortunate experience in a case recently where a man more or less in the position of this defendant was sent to an institution where the two people against whom he testified were incarcerated also, and so I would ask the Assistant to make extra effort to make sure that the Attorney General and whoever he delegates be fully aware of the fact, and to make sure that he is sent to an institution where his life will not be in jeopardy.

MR. ROONEY: Would your Honor remand him to the custody of the Customs Agents who have been keeping him

in custody up to this time, otherwise there is a possibility he may be lodged in West Street, and there are some people in West Street from what we can tell from the papers who --

THE COURT: He will be in their custody under the present arrangement, and he will not have to surrender to the authorities in the prison until such time as the Attorney General picks an institution for him to serve, and he may then be delivered to that institution by the Customs Agents.

MR. ROONEY: Thank you, your Honor.

MR. HIGGINS: Fine, your Honor.